Timur Permai Holdings Sdn Bhd v Jasa Kita Warehousing Service Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–1466–06 OF 2013
ABDUL WAHAB PATAIL, ZAWAWI SALLEH, UMI KALTHUM JJCA
9 MARCH 2015

Damages — Claim — Fire — Explosion — Damages to goods and warehouse — Client stored goods in warehouse — Whether fire originated from warehouse's owner — Whether findings of High Court correct

The appellant appealed against the decision of the High Court in allowing the claim by the respondents in respect of losses arising from the damage to the goods and warehouse of the respondents caused by fire. The first respondent rented the land and the five warehouses from the second respondent. The third respondent was a client of the first respondent and had stored his goods in the warehouses. The case for the respondents was that the fire originated from the appellant's container which contained highly flammable nitrocellulose, had spread to the first respondent's warehouse. The case for the appellant was that the fire originated from the first respondent's warehouse which then spread to the appellant's container parked on land adjoining the first respondent. The issues that arose were where the fire originated from. The primary basis of the findings of the High Court was not the report and testimony of PW8 as to what she observed at the scene after the fire, but also PW8's conclusions or findings of fact that the fire originated from the appellant's container, that the nitrocellulose spontaneously ignited and there was 'physical evidence of a second explosion'.

Held, allowing the appeal with costs:

(1) The High Court failed to address the preliminary question of the experience and expertise of PW8 such as to warrant giving her opinion any weight as an expert witness in a court of law. Acceptance of the opinion or conclusion of a witness is a critical error, the only exception being a specific finding as to the experience and expertise of that witness to give that opinion or draw that conclusion, in this case as to spontaneous combustion of nitrocellulose and the conditions causing spontaneous combustion of the nitrocellulose in this case (see para 8).

(2) The key issue before the court was what caused the explosion. On the face of it, it could have been a small fire on the appellant's side that caused it, or for that matter a small fire from the respondents' side spreading to the appellant's container. If indeed the nitrocellulose in the container was the

source of spontaneous combustion, the container would have exploded and then if there was ensuing fire, the fire spread out to other parts, including the respondents' building. But in its grounds of decision, the High Court spoke of a 'second explosion'. In other words, the explosion was caused by the fire (see para 10).

(3) From inspection of the photographs of the container after the earlier explosion, that the statement there was considerable amount of nitrocellulose, unburnt, still remaining was an overstatement. Further it was not shown how, from an explosion from spontaneous combustion of nitrocellulose in the container, there could be fire hot enough and sustained long enough from the container to cause cardboard and polystyrene on the inside of the warehouse to catch fire (see para 20).

(4) The reasoning in the report somewhat incomplete in its consideration of the various possibilities that it was unsafe to be accepted as the basis of a decision to hold that it proved upon a balance of probabilities that the fire that caused the damage to the respondents' warehouse started from spontaneous combustion of nitrocellulose in the container in the appellant's yard (see para 21).

[Bahasa Malaysia summary

Perayu merayu terhadap keputusan Mahkamah Tinggi dalam membenarkan tuntutan oleh responden-responden berkaitan kerugian yang berbangkit daripada kerosakan kepada barang-barang dan gudang responden-responden akibat kebakaran. Responden pertama menyewa tanah dan lima gudang daripada responden kedua. Responden ketiga adalah pelanggan responden pertama dan menyimpan barangannya di dalam gudang-gudang tersebut. Kes untuk responden-responden adalah bahawa kebakaran bermula daripada kontena perayu yang mengandungi nitrocellulose yang sangat mudah terbakar, telah merebak ke gudang responden pertama. Kes untuk perayu adalah bahawa kebakaran bermula daripada gudang responden pertama yang mana kemudiannya merebak ke kontena perayu yang diletakkan di tanah yang bersebelahan responden pertama. Isu yang berbangkit adalah di mana kebakaran bermula. Asas utama dapatan Mahkamah Tinggi bukan laporan atau keterangan PW8 terhadap apa yang diperhatikannya di tempat kejadian selepas kebakaran, tetapi juga kesimpulan atau dapatan fakta PW8 bahawa kebakaran bermula daripada kontena perayu, bahawa nitrocellulose secara spontan bernyala dan terdapat 'physical evidence of a second explosion'.

Diputuskan, membenarkan rayuan dengan kos:

(1) Mahkamah Tinggi gagal untuk menangani soalan awal mengenai pengalaman dan kepakaran PW8 seperti mewajarkan memberi pandangannya penting sebagai saksi pakar di mahkamah undang-undang. Penerimaan pandangan atau kesimpulan saksi adalah

kesilapan kritikal, satu-satunya pengecualian adalah dapatan spesifik terhadap pengalaman dan kepakaran saksi untuk memberi pandangan tersebut atau membuat kesimpulan tersebut, dalam kes ini terhadap pembakaran spontan nitrocellulose dan keadaan yang menyebabkan pembakaran spontan nitrocellulose dalam kes ini (lihat perenggan 8).

(2) Isu penting di hadapan mahkamah adalah apa yang menyebabkan letupan tersebut. Atas fakta, ia boleh menjadi kebakaran kecil di pihak perayu yang menyebabkannya, atau kebakaran kecil daripada pihak responden merebak ke kontena perayu. Jika ia adalah nitrocellulose di dalam kontena punca pembakaran spontan, kontena akan meletup dan jika terdapat kebakaran berikutnya, kebakaran merebak keluar ke bahagian lain, termasuk bangunan responden-responden. Tetapi dalam alasan keputusannya, Mahkamah Tinggi bercakap mengenai 'second explosion'. Dalam perkataan lain, letupan disebabkan oleh kebakaran (lihat perenggan 10).

(3) Daripada pemeriksaan foto-foto kontena selepas letupan sebelumnya, bahawa pernyataan terdapat jumlah besar nitrocellulose, tidak terbakar, masih tertinggal adalah keterlaluan. Selanjutnya ia tidak ditunjukkan bagaimana, daripada letupan pembakaran spontan nitrocellulose dalam kontena, mungkin terdapat kebakaran yang cukup panas dan berpanjangan daripada kontena untuk menyebabkan kadbod dan polistirena di bahagian dalam gudang terbakar (lihat perenggan 20).

(4) Alasan dalam laporan adalah tidak lengkap dalam pertimbangannya mengenai pelbagai kemungkinan bahawa adalah tidak selamat untuk diterima sebagai asas keputusan untuk memutuskan bahawa ia dibuktikan atas imbangan kebarangkalian bahawa kebakaran yang menyebabkan kerosakan kepada gudang responden-responden bermula daripada pembakaran spontan nitrocellulose di dalam kontena di halaman perayu (lihat perenggan 21).]]]]

Cases referred to

PP v Muhamed bin Sulaiman [1982] 2 MLJ 320, FC (refd)

Yung Kong Co Bhd v HHH Tyre Retreading Sdn Bhd & another case [2009] MLJU 253; [2009] 4 CLJ 424, HC (refd)

Cyrus Das, S Selvarajah (S Seenivasagam & David Mathews with him) (Azariah & Assoc) for the appellant.

Robin Lim Dou Shing (CY Wong with him) (Azhar & Wong) for the respondents.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant/defendant, Timur Permai Holdings Sdn Bhd ('the appellant') appealed against the decision allowing the claim by the

respondents/plaintiffs, Jasa Kita Warehousing Service Sdn Bhd , Klang Hock Polystyrene Industries Sdn Bhd and NKR Continental (M) Sdn Bhd ('the respondents') in respect of losses arising from the damage to the goods and warehouse of the respondents caused by fire on 7 November 2005. The first respondent rented the land and the five warehouses thereon from the second respondent. The third respondent was a client of the first respondent and had stored his goods in the warehouses.

[2] The case for the respondents was that the fire originated from the appellant's container which contained highly flammable nitrocellulose, had spread to the first respondent's warehouse.

[3] The case for the appellant was that the fire originated from the first respondent's warehouse which then spread to the appellant's container parked on land adjoining the first respondent.

[4] The issue, as correctly identified by the High Court, was where the fire originated from. More precisely, the issue was did the fire originate from the appellant's container.

[5] In considering the balance of probabilities, the High Court:

(a) accepted

(i) the evidence of PW8 Aini Ling Juh Chin, a consulting engineer employed with Forensic Services (M) Sdn Bhd who had prepared a detailed report;

(ii) PW8's conclusion that the fire originated from the nitrocellulose remains in the appellant's container on the grounds that an examination of the remains of the container and the physical evidence of a second explosion in the container, of deformed vertical steel support beams of the adjacent hoarding, tearing of a steel sheet from the sheet hoarding, release of a catch on the door, dents on the side of the container, and imprints on the chain link fence on the adjacent container wall; and

(iii) PW8's conclusion that it was unlikely that the fire originated from the rear of the first respondent's warehouse D2 because:

(1) the goods in the section of the warehouse immediately adjacent to the container were non-flammable and stable liquid chemicals did not pose a fire hazard;

(2) the report also considered and ruled out other potential causes of fire at the warehouse ie deliberate act of arson, electrical circuit, as well as chemical from ruptured cylinders projected from the warehouse;

(b) dismissed the defence submissions on:

(i) discrepancies of PW1 Mohamad bin Yaacob's police report and oral testimony in respect of hearing an explosion;

(ii) the lack of a chemist report to prove that nitrocellulose was present in the container;

(iii) the report of PW6 Mohd Puzi bin Mohd Tabot, the Timbalan Pengarah Jabatan Bomba dan Penyelamat Negeri Selangor that the cause of the fire is unknown; and

(iv) that no detailed investigation and findings of the Jabatan Bomba were adduced before the court to refute the findings of PW8;

(c) held the opinion that the respondents had adduced sufficient credible and cogent evidence that the fire originated in the container parked in the appellant's premises and was caused by the presence of highly inflammable nitrocellulose that was present in significant amount, which had self ignited and caused the fire, and due to the proximity of the defendant's warehouse in the adjoining property, the fire had spread to the respondents' warehouse.

FINDINGS AND CONCLUSION

[6] The primary basis of the findings of the High Court was not the report and testimony of PW8 as to what she observed at the scene after the fire, but also PW8's conclusions or findings of fact that the fire originated from the appellant's container, that the nitrocellulose spontaneously ignited and there was 'physical evidence of a second explosion'. When asked if she could tell the court where the fire originated from, PW8, a witness called by the respondents said:

> A36. According to the account of the events surrounding the discovery of the fire related to me by En Mohamad, the fire possibly had originated from the container yard at Timur Permai Holdings S/B.

[7] There was otherwise little, if any, in the way of a finding of fact made by the High Court for itself. While PW8's testimony as a witness as to what she saw at the scene is entirely reliable and may be accepted, PW8's findings and conclusions are matters of opinion. Where the fire originated from was the issue of fact before the High Court. In accepting the testimony and report of PW8, the High Court accepted PW8's assessment of other witnesses at the scene, namely Encik Mohammad, Encik Fauzi, Encik Yubaraj and Mr Leong (see QA39):

> I do not see any basis for any fabrication of the facts by any one of them. Furthermore, their accounts of the event were consistent and corroborate with one

another when interviewed separately, and the information revealed by the records from burglar alarm records, fire protection system response guard's logbook, fire brigade records and telephone calls listing.

[8] The High Court failed to address the preliminary question of the experience and expertise of PW8 such as to warrant giving her opinion any weight as an expert witness in a court of law.

Acceptance of the opinion or conclusion of a witness is a critical error, the only exception being a specific finding as to the experience and expertise of that witness to give that opinion or draw that conclusion, in this case as to spontaneous combustion of nitrocellulose and the conditions causing spontaneous combustion of the nitrocellulose in this case (see *Public Prosecutor v Muhamed bin Sulaiman* [1982] 2 MLJ 320 (FC). The necessity to refute opinions of PW8 did not arise.

[9] The witness statement of Encik Mohamad bin Yaacob (PW1) shows PW1 to be the better witness, being the person who discovered the fire, sought help and tried to fight the fire. The High Court inexplicably not only failed to address the evidence of PW1, but also failed to explain why the testimony of PW1 was rejected as it appeared to be. Nor did the counsel for the respondents before us referred to the testimony of PW1 to support a finding that the fire originated from the appellant's side.

[10] According to PW1, the first he knew of the fire was when he went to investigate the sound of a loud explosion (QA22). It was evident there was a big fire after the explosion. But the key issue before the court was what caused the explosion. On the face of it, it could have been a small fire on the appellant's side that caused it, or for that matter a small fire from the respondents' side spreading to the appellant's container. If indeed the nitrocellulose in the container was the source of spontaneous combustion, the container would have exploded and then if there was ensuing fire, the fire spread out to other parts, including the respondents' building. But in its grounds of decision, the High Court spoke of a 'second explosion'. In other words, the explosion was caused by the fire.

[11] We sought guidance from the submissions for the respondents made before us. The origin and source of the fire was dealt with commencing para 12 of the written submissions. The argument was:

(a) the fire did originate from the container located on the appellant's land;

(b) the first fire truck arrived at the appellant's land in response to a call from a 'Zulkifli' about a fire involving tyres on the appellant's land;

(c) DW3 was clearly a partisan witness, whilst DW4's evidence was totally inconsistent with that of DW2 and DW3;

(d) there was no evidence from the appellant to prove that the container was empty when it was on the appellant's land;

(e) the testimony of DW5 was absolutely unreliable and could not be believed at all. The entry on his passport showed he was employed by another employer;

(f) there was a failure by the appellant to establish the presence of DW5 at the site of the appellant's land during the time of the fire on 7 November 2005;

(g) DW5's testimony that he was standing on a forklift and he could see the fire spreading from warehouse D2 over to the appellant's land could not have been possible because his view would have been blocked by stacked containers;

(h) PW8 had clearly stated that she had testified in many cases in Malaysia and also abroad regarding fire investigations and was never once questioned by the appellant as to her expertise as an expert in fire investigations;

(i) PW8 found evidence of a second explosion that happened earlier to the container;

(j) PW8 had stated that there was an existing gap to the steel sheet hoarding, the difference was a matter of size only, it was smaller before the fire/explosion;

(k) the issue of not stating 'letupan' in PW1's police report was a misnomer issue because the police report was not recorded by PW1 but by the police officer;

(l) PW8's answers to cross-examination clearly showed that both Encik Fauzi and Encik Yuvaraj did not inform PW8 that they heard an explosion;

(m) PW8 had clearly stated in her forensic report that she collected samples of the nitrocellulose samples for preservation for future reference;

(n) PW8 had answered in cross-examination Q10, p 268 *rekod rayuan* that she had spoken to her colleague who investigated on the earlier fire to the container and she had mentioned that this same colleague had concluded the fire was a result of spontaneous ignition of nitrocellulose;

(o) PW8 has clearly testified during cross-examination that it was the process of decomposition in the nitrocellulose remnants in the container which caused it to spontaneously ignite and explode in the container;

(p) PW8 had addressed all possibilities before arriving at her conclusion that the fire originated from the container;

(q) the appellant's counsel had failed to cross-examine PW2 and PW3, the makers of exh D6 and D7, which did not show any conclusion as to the cause of fire; and

(r) the appellant failed to establish the fire started from warehouse D2.

[12] As we have said earlier above, the issue more precisely put was whether the respondents had proved upon a balance of probabilities that the fire started from the appellant's container. It was not necessary for the appellant as defendant to establish the fire started from the respondent's warehouse. It was not for the appellant to be aggrieved with PW2 and PW3 if their reports did not list the cause of the fire that damaged the respondents' warehouse and goods. Where a fire truck arrived first, or who lodged a report did not determine the location of where the fire started. Nor did labelling a witness partisan or unreliable provide any contribution to discovering the truth. The arguments as to DW5 were irrelevant. We have addressed the evidence of PW8 earlier above. We observed that it emerged from the submissions for the respondents that the 'second explosion' was in fact an earlier explosion involving the same container.

[13] We examined the forensic report by PW8 at *rekod rayuan Bah C (Jilid 1)* pp 736–886. It was clearly marked 'Private and Confidential For the Purposes of Litigation'. The report was made at the behest of the first respondent.

[14] That part of the report that pertained to the container began at p 754. At s 4.4, PW8 dealt with the subject of origin of the fire and its spread. It began as follows:

> Following from the preceding sections, the evidence that collectively indicated a fire origin at the container in the adjacent yard of Timur Permai Holdings, included but was not limited to the following. ...

[15] The reasoning for the conclusion was as follows:

(a) the fire and burglar alarm system indicated the fire in the warehouse first started in the rear half;

(b) PW1 Mohamad Yaacob's description of circumstances surrounding the discovery of the fire (refer s 3.2) indicated that the fire had spread into the warehouse from the container yard;

(c) the relatively isolated but severe burning of the container;

(d) the relative position between the container and the building;

(e) the damage to the boundary hoarding (displaced steel sheet) showing the sheet had been torn and displaced as opposed to burnt and heat deformed and/or collapsed;

(f) there was impact damage on the section of hoarding beside where the displaced sheet came to rest;

(g) that is to say, there was evidence of an explosion which caused the tearing of the sheet, with the spraying of a combustible material, before there was a fire at the boundary area;

(h) the directional pattern of combustible deposit on the displaced sheet indicated that the materials came from the rear direction which could only have been from the container.

[16] The PW8 report proceeded to address the probabilities of 'Container v Warehouse Fire'. It considered how a fire originating at the container could have spread into the warehouse and caused the damage in the warehouse, that an explosion and the venting of hot gases through gaps in the hoarding towards the wall of the warehouse would ignite the goods, especially the corrugated cardboard and polystyrene packaging inside the warehouse which would have been stacked close to the wall.

[17] We observed that it involved a number of assumptions, of not mere explosion but a fire burning hot enough outside the warehouse wall to cause cardboard and polystyrene inside the warehouse to ignite and burn. Although there was a ruptured ethylene oxide gas cylinder projected into the appellant's yard from the warehouse, and evidence of other ruptured cylinders in the warehouse, PW8 accepted the indication of Mr Leong Kee Leong, the operations manager of the first respondent that the cylinders were empty:

> ... However, Mr Leong indicated they were empty cylinders, and this was verified by their customer (see Appendix E). In short, there was nothing in the rear half of the warehouse that posed a fire or explosion hazard. In contrast, the material in the container was dangerous, with a history of catching fire and exploding, as explained in the following sections.

[18] We observed that the reasoning applied was that the material in the appellant's container was dangerous, with a history of catching fire and exploding, ergo the cause of fire could not have been the ethylene oxide gas cylinders despite that ethylene oxide gas is flammable gas used in welding operations, and a ruptured cylinder had been thrown out from the warehouse into the appellant's yard. In other words, from the mute evidence observed after the fire, it remained not possible to say from where or how the fire started. The container was the subject of two explosions. The state of the container after the first explosion was not compared to the state after the explosion on 7

November 2005. It was simply accepted that there was spontaneous combustion of the nitrocellulose causing the explosion on 7 November 2005 and the ensuing fire, when a fire outside the container could also cause temperatures to rise in the container to the auto-combustion temperature of 140 degrees celsius of nitrocellulose, and then causing the ejection of hot air through the gap in the hoarding and to the walls of the warehouse.

[19] The statement was made at p 26 of the report that after the earlier explosion:

> ... In fact Forensic Services (M) Sdn Bhd was appointed to investigate into the 3 May fire/explosion. The investigator, Mr Poon Poh Wong, was able to conclude that the fire was a result of spontaneous ignition of nitro-cellulose. Some of the photographs taken of the container after the incident in May 2005 are included as Appendix F. It can be seen that a considerable amount of nitrocellulose, unburnt, still remained immediately after the May 2005 fire.

[20] It would seem, from inspection of the photographs of the container after the earlier explosion, that the statement there was considerable amount of nitrocellulose, unburnt, still remaining was an overstatement. Further it was not shown how, from an explosion from spontaneous combustion of nitrocellulose in the container, there could be fire hot enough and sustained long enough from the container to cause cardboard and polystyrene on the inside of the warehouse to catch fire.

[21] In short, we found the reasoning in the report somewhat incomplete in its consideration of the various possibilities that it was unsafe to be accepted as the basis of a decision to hold that it proved upon a balance of probabilities that the fire that caused the damage to the respondents' warehouse started from spontaneous combustion of nitrocellulose in the container in the appellant's yard.

[22] This conclusion was consistent with the reports of the fire department (see the 16 November 2005 report and the 7 December 2005 reports) and the testimonies of PW6 Mohd Puzi bin Mohd Tabot and DW6 Jamaluddin bin Ismail that the cause of the fire was unknown. They were far more disinterested witnesses than PW8 and their reports must be given due weight (see *Yung Kong Co Bhd v HHH Tyre Retreading Sdn Bhd & another case* [2009] MLJU 253; [2009] 4 CLJ 424.

[23] Accordingly, we allowed the appeal with costs in the sum of RM20,000, set aside the order of the High Court and ordered that the deposit be refunded.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor